Nos. [redacted]

WILLIAM FOX, Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

PETITION FOR WRITS OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN REASS,
Counsel for Petitioner.

HIRSH, NEWMAN, REASS & BECKER,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. and

WILLIAM FOX, Petitioner,

vs.

CAPITAL COMPANY, a California corporation.

PETITION FOR WRITS OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William Fox respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

A judgment in the sum of $297,412.91 was entered by confession in favor of the judgment-creditor and against the petitioner in the United States District Court for the Southern District of New York on July 18, 1935. On September 28, 1935, a subpoena in proceedings supplementary to judgment (R. 1), pursuant to Act of Congress June 1 1872, Ch. 255, Sec. 6, 17 Stat. 197 (R. S. Sec. 916, 28 U. S. C. Sec. 727), Common Law Rule 5 of the United

States District Court for the Southern District of New York (as set forth in the Appendix, infra, p. 22), and Article 45 of the Civil Practice Act of the State of New York (L. 1920, Ch. 925, as amended by L. 1935, Ch. 630, in effect September 1, 1935), was issued. On October 8, 1935, the aforesaid subpoena was served upon the petitioner on a railroad train at Frankfort Junction, in the State of Pennsylvania (R. 2), directing his appearance for examination at the courthouse of the United States District Court for the Southern District of New York on a day certain. The petitioner did not appear pursuant to that subpoena (R. 5). Thereafter, the judgment-creditor moved to punish the petitioner for contempt, for failure to appear pursuant to the aforesaid subpoena, by order to show cause served upon the petitioner at the Hotel Claridge, in Atlantic City, New Jersey, and returnable to the United States District Court for the Southern District of New York (R. 3-5). The petitioner, appearing specially in the said District Court, contended that the United States District Court for the Southern District of New York did not acquire any jurisdiction over him by reason of the service of the subpoena in the State of Pennsylvania, since the subpoena constitutes the original process commencing the proceedings known as "Proceedings Supplementary to Judgment"; that, therefore, the subpoena and the service thereof were void. The petitioner, therefore, further contended that he should not be punished for the violation of a void subpoena. On December 2, 1935, a decision was rendered upon this motion by Bondy, D. J. (R. 6), as follows:

> "The proceedings supplementary to execution (pursuant to Common Law Rule 5 of this Court) were ancillary to the original action in this Court. See Sherman Bank v. Schubert Theatrical Co., 238 Fed. 225, 228; they therefore could be instituted by the service of a subpoena outside of the territorial limits of this district. See Lerman v. Krenther-Arnold Hinge Last Co., 284 U. S. 448; 3 Cyc. of Fed. Proc. Sec. 750, and the order to show cause why the defendant should not be punished for con-

tempt could likewise be served beyond the territorial limits of this district. See Lerman case, supra.

Motion is therefore granted with leave to defendant to purge himself of the contempt by submission to examination. Settle order on notice.

WM. BONDY,
U. S. D. J.

Dec. 2, 1935."

An order was made on December 19, 1935, and entered December 20, 1935, in the United States District Court for the Southern District of New York (R. 27-30), holding that the subpoena had properly been served and further holding the judgment-debtor (petitioner) in contempt. This order provided that the petitioner might purge himself of the contempt by appearing for examination on or before a day certain, and in the interim provided that the question of punishment for the aforesaid contempt would be held in abeyance. The petitioner then filed a petition for appeal to the Circuit Court of Appeals for the Second Circuit, from the order of December 19, 1935 (R. 30). Thereupon an order was made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said order of December 19, 1935. The judgment-creditor moved to dismiss the appeal on the ground that the order of December 19, 1935, was not a final order, and, therefore, not appealable (R. 61). The Circuit Court of Appeals, by order dated January 20, 1936, dismissed the appeal, without opinion (R. 80). Thereupon a further order was made by the United States District Court for the Southern District of New York, under date of February 7, 1936, and entered February 20, 1936 (R. 54-56), imposing the following punishment on the petitioner:

(a) A fine in the sum of $235,082.03, representing the balance alleged to be due and unpaid on account of the judgment;

(b) Directing the petitioner to pay to the attorneys for the judgment-creditor the sum of $10,000 as and for their costs; and

(c) Directing the issuance of a warrant to a marshal forthwith to arrest and imprison the petitioner until he shall have paid the said costs of $10,000 *and* have paid the fine of $235,082.03 or submitted to examination.

An order was then made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said orders of February 7, 1936, and December 19, 1935, to the Circuit Court of Appeals for the Second Circuit (R. 59). A motion was thereupon made by the judgment-creditor to dismiss the appeal on the ground that the said orders of February 7, 1936, and December 19, 1935, were not final orders and hence not appealable (R. 81). The Circuit Court of Appeals for the Second Circuit, by order dated March 5, 1936 (R. 95), dismissed the said appeal without opinion.

B.

Reasons Relied On for the Allowance of the Writs.

1. The decision of the United States District Court for the Southern District of New York and the refusal of the Circuit Court of Appeals for the Second Circuit to review the determination of the District Court will deprive the petitioner of a review of the important question of jurisdiction, unless this Court will grant a review.

2. The decision of the District Court assumed jurisdiction in total disregard of the fact that the process instituting the proceedings known as "Supplementary Proceedings" was not served within the territorial limits of the United States District Court for the Southern District of New York, as required by law.

3. The District Court has decided a question of Federal jurisdiction of vital importance, which has never been

settled directly, either by the Circuit Court of Appeals of any Circuit or by this Court, and which should be settled by this Court.

4. The United States Circuit Court of Appeals for the Second Circuit has so strictly construed the extent of the appealability of the orders of the District Court, as to deprive the petitioner of a review of the order of the District Court, involving a very substantial right, and has thus sanctioned a departure by the District Court from express jurisdictional limitations.

5. The United States Circuit Court of Appeals for the Second Circuit has decided an important question of law regarding its appellate jurisdiction in a manner which is untenable.

6. The United States Circuit Court of Appeals for the Second Circuit has so strictly construed the extent of its appellate jurisdiction in express violation of the intent and purpose of appellate courts, which determination has not yet been but should be settled by this Court.

7. The result of these acts by the Circuit Court of Appeals and the District Court will be to deprive the petitioner of his liberty and his property in violation of his constitutional rights and without due process of law.

C.

Prayer for the Writs.

WHEREFORE, it is respectfully submitted that the writs of certiorari should be granted.

WILLIAM FOX, Petitioner,
By BENJAMIN REASS,
Counsel for Petitioner.

April 6, 1936.

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. and

WILLIAM FOX, Petitioner,

vs.

CAPITAL COMPANY, a California corporation.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I

The Opinions of the Courts Below.

The opinion of the District Court for the Southern District of New York has not yet been officially reported. It was made by BONDY, D. J., a Judge of the United States District Court for the Southern District of New York, under date of December 2, 1935 (R. 6). No opinions were written by the United States Circuit Court of Appeals for the Second Circuit in dismissing the appeal from the order of December 19, 1935, and in the subsequent dismissal of the appeal from the orders of December 19, 1935, and February 7, 1936.

II

Jurisdiction of This Court.

1. The jurisdiction of this Court is based upon Judicial Code, Sec. 240 (a) (28 U. S. C. Sec. 347 [a]), as amended by Act of Congress February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938.

2. The orders of the District Court to be reviewed are dated December 19, 1935, and February 7, 1936, and the orders of the United States Circuit Court of Appeals for the Second Circuit to be reviewed are dated January 20, 1936, and March 5, 1936.

III

Statement of the Case.

The essential facts of the case are stated in the foregoing petition, and in the interest of brevity are not repeated here.

IV

Specification of Errors.

The United States District Court for the Southern District of New York erred:

1. In granting the motion of the judgment-creditor to punish the judgment-debtor as and for a civil contempt of this Court.

2. In failing to deny the said motion to punish the judgment-debtor as and for a civil contempt of this Court.

3. In refusing to find that process to commence an action or special proceeding must be served on the defendant or judgment-debtor, as the case may be, within the territorial limits of the United States District Court for the Southern District of New York.

4. In refusing to find that the subpoena in supplementary proceedings constituted the process which commences that special and independent proceeding known as "Proceedings Supplementary to Judgment", as defined by Section 916 of the Revised Statutes (28 U. S. C. Sec. 727), Common Law Rule 5 of the United States District Court for the Southern District of New York, and Article 45 of the Civil Practice Act of the State of New York.

5. In refusing to find that failure to obey a void process does not constitute a civil contempt of court.

6. In refusing to find that the Act of Congress March 2, 1793, Ch. 22, Sec. 6, 1 Stat. 335, as amended March 4, 1925, Ch. 526, Sec. 2, 43 Stat. 1265 (R. S. Sec. 876, 28 U. S. C. Sec. 654), providing for the service of a subpoena within one hundred miles from the courthouse, refers only to witnesses in a proceeding which is pending and which was validly instituted and cannot be the basis of instituting an action or special proceeding, and in refusing to find that the said Section 876 of the Revised Statutes (28 U. S. C. Sec. 654) is not applicable to the instant proceedings.

7. In depriving the petitioner of his liberty and his property without due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

8. In making the order dated December 19, 1935, filed in said Court on December 20, 1935.

9. In making the order dated February 7, 1936, and filed in said Court on February 20, 1936.

10. In fining the judgment-debtor the amount alleged to be due and unpaid on account of the judgment herein.

11. In directing the judgment-debtor to pay the attorneys for the judgment-creditor the sum of $10,000 as and for the costs of this proceeding.

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the order of December 19, 1935, was not a final order and hence not appealable.

2. In holding that the order of February 7, 1936, was not a final order and hence not appealable.

ARGUMENT.

Summary of Argument.

POINT A

The jurisdiction of the United States District Court for the Southern District of New York is expressly defined by congressional statute. Service of process to commence an action or special proceeding must be effected within its territorial limits.

POINT B

Supplementary proceedings are special proceedings, independent of the original action in which the judgment was obtained. The subpoena to commence that special proceeding can only be served within the territorial limits of the Southern District of New York. The service made in Philadelphia, Pennsylvania, was void.

POINT C

The failure to obey a void process does not constitute a contempt.

Point D

The order of December 19, 1935, entered in the United States District Court for the Southern District of New York on December 20, 1935, and supplemented by the order of February 7, 1936, and entered February 20, 1936, constitute appealable orders.

POINT A

The jurisdiction of the United States District Court for the Southern District of New York is expressly defined by congressional statute. Service of process to commence an action or special proceeding must be effected within its territorial limits.

The rule is firmly established that the process of a District Court cannot run beyond the physical limits of the jurisdiction and such process must be served upon the person to whom it is directed within that district. Judicial Code, Sec. 51 (28 U. S. C. Sec. 112), as amended March 4, 1925, Ch. 526, Sec. 1, 43 Stat. 1246; *Munter* v. *Weil Co.*, 261 U. S. 276; *Hughes Federal Practice,* Vol. 1, Secs. 243, 250.

Robertson v. *Labor Board,* 268 U. S. 619, 622, states the jurisdictional limitations of the District Court as follows:

> "Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, *Harkness* v. *Hyde,* 98 U. S. 476; *Ex parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland* v. *Sprague,* 12 Pet. 300, 330."

It is of course a fact that the entire State of Pennsylvania is outside of the geographic limits of the United States District Court for the Southern District of New York.

POINT B

"Proceedings supplementary to judgment" are special proceedings, independent of the original action in which the judgment was obtained. The subpoena served upon the petitioner to commence that special proceeding constituted the process which can be served only within the territorial limits of the United States District Court for the Southern District of New York. Service made in the State of Pennsylvania was, therefore, void.

"Proceedings supplementary to judgment" are statutory proceedings authorized by Article 45 of the Civil Practice Act of the State of New York (hereinafter sometimes referred to as "C. P. A."). Common Law Rule 5 of the United States District Court of the Southern District of New York, pursuant to R. S. Sec. 916 (28 U. S. C. Sec. 727), adopts and makes Article 45 of the C. P. A. part of the Federal practice. Thus, Article 45 of the C. P. A. and interpretations thereof by the Courts of the State of New York constitute the law of the United States District Court for the Southern District of New York, to the same extent as if Congress itself had expressly passed that legislation. *Fink* v. *O'Neill*, 106 U. S. 272, 276; *Custer* v. *McCutcheon*, 283 U. S. 514, 516. The District Court thus having adopted the State law must adopt it in toto and cannot alter it in any respect. *McCracken* v. *Hayward*, 43 U. S. 608.

The rule is clearly defined in *Ex Parte Boyd*, 105 U. S. 647, 652, thus:

> "It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature

> and form of writs of execution for the enforcement of judgment, but also as to *all proceedings thereupon.*" (Italics the Court's.)

Amy v. *Watertown*, 130 U. S. 301, confirms the rule that the District Court for the Southern District of New York is definitely bound to follow the New York State practice, with reference to supplementary proceedings, and requires that the subpoena which institutes supplementary proceedings must be served in the same manner as the State statute provides for service in a State court proceeding. In that case this Court held:

> "But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceedings, *must* conform to the state law, and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws of the State. With regard to the mode of serving mesne process upon corporations and other persons, Congress has not laid down any rule; *and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit*" (p. 304). (Italics ours.)
>
> * * * * * *
>
> "Here we are bound by statute; and not by the state statute alone, but by the Act of Congress, which obliges us to follow the state statute and state practice. *The Federal Courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the state law;* and according to this law the judgment of the Circuit Court was correct and is, therefore, *affirmed*" (p. 320). (Italics ours.)

There remains thus to inquire as to the applicable New York law. Section 773 of the C. P. A. defines supplementary proceedings as special proceedings (see Appendix,

infra, p. 22). *Meyers* v. *Consolidated Ice Co.*, 196 N. Y. 471, 473. In *Harris* v. *Weiss* (not officially reported), 105 N. Y. Supp. 8, 9, is found a detailed statement by the commissioners who drafted the statutory provisions now contained in Article 45 of the C. P. A. to the effect that supplementary proceedings and the code provisions were intended to and did set up *supplementary proceedings as separate, independent and original proceedings.*

The Court wherein the judgment was obtained does not, therefore, retain any jurisdiction over the person of the defendant for the purpose of supplementary proceedings by reason of the original service of the summons in the action. A new and independent process must be served in the same manner and to the same extent as a summons in an action in order properly to institute the supplementary proceedings. *Rosen* v. *Polansky,* 121 N. Y. Misc. 395.

A special proceeding is distinguished from an action by Section 46-a of the New York General Construction Law (Cons. Laws, Ch. 22, 1920):

> "Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

Section 218 of the Civil Practice Act provides:

> *"A civil action is commenced by the service of a summons,* which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon." (Italics ours.)

Section 403 of the Civil Practice Act defines a subpoena as a legal process (as set forth in the Appendix, infra, p. 24).

Rule 21 of the New York Rules of Civil Practice (adopted pursuant to L. 1920, Ch. 902, as amended by L. 1921, Ch. 370), entitled *"Manner of Service of Papers to Begin a Proceeding"* provides:

> *"The provisions of the statutes and rule relating to the mode of personal service of a summons shall*

> *apply to the service of any process or other paper whereby a proceeding is begun in a court,* or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action." (Italics ours.)

Section 225 of the Civil Practice Act reads as follows:

> "Personal service of the summons upon the defendant being a natural person must be made by delivering a copy thereof *within the state* as follows: * * * to the defendant in person." (Italics ours.)

For further elucidation as to the proper institution of a special proceeding, see *Hill* v. *Hill,* 124 N. Y. Misc. 102, in which the Court held:

> "This is a special proceeding. * * * Service upon the various parties herein has been made in the manner provided for the personal service of a summons. The court, therefore, has acquired jurisdiction of the parties" (124 Misc. 102, 105).

It follows, therefore, that the subpoena which sought to commence the special proceeding entitled "Proceedings Supplementary to Judgment" is required to be served within the jurisdiction of the Court in the same manner, exactly, as a summons in an action.

The District Court below obviously overlooked the applicable New York statutes and authorities when it held that the "proceedings supplementary to execution (pursuant to Common Law Rule 5 of this Court) were ancillary to the original action in this Court" (R. 6).

The case cited by Judge Bondy in his opinion (R. 6) *as to the nature of supplementary proceedings has not the slightest relevancy to that matter.* The District Court was obviously confused by the fact that creditor's bills in equity which are proceedings *in rem* are considered ancillary proceedings. Though statutory supplementary proceedings are now used to a great extent in lieu of

creditor's bills, nevertheless, the nature of statutory supplementary proceedings is derived exclusively from the statutes which provide for supplementary proceedings.

It cannot be said that supplementary proceedings superseded the old creditor's bill, since the creditor's right to proceed by action was not taken away by the statutes authorizing supplementary proceedings and the two remedies still co-exist. *Carmody's N. Y. Practice,* Vol. 5, Ch. 34.

While the Court may have jurisdiction in rem upon the judgment and thus may define the creditor's bill as an ancillary proceeding, the same rules cannot apply to supplementary proceedings which are definitely proceedings in personam, where jurisdiction over the person of the debtor must be acquired by due service of process. (*Munter* v. *Weil Co.,* 261 U. S. 276.)

Matter of Maltbie v. *Lobsitz Mills Co.,* 223 N. Y. 227, 232, 234, expressly defines supplementary proceedings as "proceedings *in personam*", and "being a summary proceeding created by statute and in derogation of the common law, must be strictly construed" and which "cannot be enlarged by construction nor by law available or valid, except by strictly following the directions of the act."

It appears, therefore, that the service of the subpoena or process instituting supplementary proceedings herein which was effected near Philadelphia, in the State of Pennsylvania, and outside of the territorial jurisdiction of the United States District Court for the Southern District of New York, was void, and, therefore, a nullity.

R. S. Sec. 876 (28 U. S. C. Sec. 654) which provides for service of subpoena upon witnesses within a hundred miles of the holding of Court does not apply here because by its very terms this statute applies to a "witness" in a pending proceeding. There was no pending proceeding at the time of the service of the subpoena on the petitioner, for it is the service of this very subpoena

upon the petitioner *as a party* which is relied upon as the process instituting the proceeding. Furthermore, R. S. Sec. 876 (28 U. S. C. Sec. 654) provides for service upon a witness who lives within a hundred miles of the courthouse. Although the word "lives" has been interpreted to include place of temporary sojourn, it has never been extended to include a situation, as here, where service was effected upon a railroad train (R. 2) where the very act of traveling demonstrates that the place of service was not a place of sojourn.

POINT C

The failure to obey a void process does not constitute contempt.

Service of the subpoena upon the petitioner outside of the jurisdictional limits of the District Court was a nullity. Disobedience of a void subpoena or mandate does not constitute contempt.

Beauchamp v. *United States,* 76 Fed. (2d) 663, summarizes the rule as follows:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.
>
> When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. * * *' Ex parte Fiske, 113 U. S. 713, 5 Sup. Ct. 724, 726, 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, L. Ed. 216." 76 Fed. (2d) 663, 668.

The authorities of the State of New York are in accord. In *Matter of Hollingshead Co.* v. *Santillo,* 121 N. Y. Misc. 200, the Court ruled:

> "I hold, therefore, that the original order for the judgment debtor's examination was void, and the debtor was not in contempt for disobeying it. Motion [to punish] denied" (p. 202).

POINT D

The orders of the District Court dated December 19, 1935, and February 7, 1936, constitute final orders appealable to the Circuit Court of Appeals for the Second Circuit. The Circuit Court of Appeals erred in dismissing the appeals.

These orders of the District Court not only punished the petitioner for contempt, but fixed the punishment as follows: (a) it directs that the petitioner be fined in the sum of $235,082.03, the amount alleged to be due and unpaid on account of the judgment, which fine can be avoided by the submission of the petitioner to examination; (b) it directs that the petitioner pay to the attorneys for the judgment-creditor the sum of $10,000, *which amount must be paid except upon the forfeiture by the petitioner of his liberty,* and (c) directs that the petitioner be imprisoned until he pays the fine or submits to examination and, in addition, pays the said sum of $10,000.

The Conformity Acts of Congress, Act of Cong. June 1, 1872, Ch. 255, Secs. 5, 6, 17 Stat. 197 (R. S. Secs. 914, 916, 28 U. S. C. Secs. 724, 727), have no application whatsoever to the appellate jurisdiction of the Circuit Court of Appeals. By express provision of the Conformity Acts (R. S. Secs. 914, 916 [28 U. S. C. A. Secs. 724, 727]), conformity is limited to proceedings in the District Courts. Hence, any limitations or restrictions on the appellate jurisdiction of the New York Court of Appeals have no binding effect or persuasive force in determining the appel-

late jurisdiction of the Circuit Court of Appeals, the contrary having been contended in the Circuit Court of Appeals by the judgment-creditor. The appellate practice in the Circuit Court of Appeals is defined in Chapter 6 of the Judicial Code (Title 28, U. S. C.).

Act of Cong. March 3, 1891, Ch. 517, Sec. 6, 26 Stat. 828, as amended February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 936 (Judicial Code Sec. 128, 28 U. S. C. Sec. 225), defines the appellate jurisdiction of the Circuit Court of Appeals as follows:

> "(a) Review of Final Decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error *final decisions.* • • •" (Italics ours.)

In the case of *Odell* v. *H. Batterman & Co.,* 223 Fed. 292, it is held that:

> "Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal" (p. 295).

In *Chief Consol. Min. Co.* v. *Mammoth Min. Co.,* 29 Fed. (2d) 703, the Court held:

> "A final order is one which determines a substantial right against a party in such a manner as leaves him no adequate relief except by appeal.
>
> Odell v. Batterman Co. (C. C. A. 2), 223 F. 292; American Brake Shoe and Foundry Co. v. New York Rys. Co. (C. C. A. 2), 282 F. 523.
>
> *And this is true irrespective of final decree in the main litigation.* (Citing cases.)" (p. 705). (Italics ours.)

In *Amer. Brake Shoe & Foundry Co.* v. *N. Y. Rys. Co.,* 282 Fed. 523, at pages 527, 528, the Court stated:

> "An adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no

> adequate relief, except by recourse to an appeal. [Citing Odell case.] *If the petitioners have a right of immediate payment, the orders must be regarded as a determination and denial of a substantial right, and which leaves no adequate relief, except by recourse to an appeal. As such we have a right to review them.*" (Italics ours.)

In *Rector* v. *United States,* 20 Fed. (2d) 845, 872, the Court stated:

> "• • • It is certain that an *order is final and appealable if it is of a character which settles substantial rights; which makes no reservation as to its effect; which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree in the main litigation.* With this conception of finality in mind, we proceed to test thereby these orders reducing royalties." (Italics ours.)

Apparently, the Circuit Court of Appeals was confused as to the meaning and significance of the term, "final decisions", as a limitation upon its appellate jurisdiction. There is no requirement that the decree or order from which the appeal is taken must finally determine the action or special proceeding as is required for the appellate jurisdiction of the New York Court of Appeals. We note in our case that not only are the orders of the District Court, dated December 19, 1935, and February 7, 1936, determinations by the District Court of a substantial right against the petitioner, but the further fact stands uncontradicted that there are no means by which the petitioner may avoid the payment to the attorneys for the judgment-creditor of the sum of $10,000. That is an irrevocable decree, which cannot be satisfied except by the payment of that sum. It may well be asked what further act is required or what further order or decree can be made, which will constitute a final determination or a final decision? The petitioner has been adjudged in contempt, he has been fined a substantial sum, equal to the amount alleged to be due and

unpaid on account of the judgment, although it appears on the record (R. 74, 75) and it is now being contested in the State of New Jersey that this judgment has been more than fully paid. The petitioner has furthermore been directed to pay the sum of $10,000 and to be incarcerated until he does so.

There is nothing further for the judgment-creditor to do. There is no further order of the District Court to be issued.

These supplementary proceedings are special proceedings in which no judgment or decree can be entered. Under the interpretation given by the judgment-creditor and, apparently, followed by the Circuit Court of Appeals, nothing will ever be final with respect to the rights of the petitioner, unless and until these proceedings come to an end, which, under the laws of the State of New York, may never eventuate.

The judgment-creditor relied in the Circuit Court of Appeals upon the decision of this Court in the case of *Doyle* v. *London Guarantee & Accident Co., Ltd.*, 204 U. S. 599. There, a party to the action was directed to produce certain books and records before trial.

Thus the direction to produce the books was made prior to the entry of judgment in the action and in order to enable the party seeking the books to prepare the case for trial. The failure to produce the books resulted in an order adjudging the said party in contempt and further directed a fine in the sum of $250, which could have been avoided by the delivery of the books requested. Furthermore, no question of the jurisdiction of the Court to direct the production of the books was put in issue.

Therefore, the differences between the holding in the *Doyle* case and the determination of the Circuit Court of Appeals at bar are threefold:

(1) In the *Doyle* case, leave to purge was given; in this case, the requirement for the payment of $10,000 to counsel for the judgment-creditor is final and no leave to purge is granted.

(2) In the *Doyle* case, the order was preliminary to a hearing in which a final judgment would be entered from which an appeal would lie bringing up for appellate review the contempt order; in this case, no final judgment, no final decree, and no other final disposition or determination will ensue.

(3) In the *Doyle* case, no issue was made respecting the jurisdiction of the Court which made the order directing the production of the books; in this case, the question of jurisdiction is paramount.

The denial of a right to appeal from the contempt order in the *Doyle* case meant only the postponement of the right to appeal on the part of the aggrieved party, whereas in our case, the refusal of the Circuit Court of Appeals to entertain the appeals from the orders of December 19, 1935, and February 7, 1936, constitutes a final and permanent refusal to review the orders of the District Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise of this Court's supervisory powers in order that vital questions of Federal law may be settled, as hereinabove discussed, and that to such an end writs of certiorari should be granted and this Court should review the determinations of the Courts below and finally reverse them.

Respectfully submitted,

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APPENDIX.

Common Law Rule 5 of the United States District Court for the Southern District of New York provides as follows:

> "In Common Law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects, proceedings supplementary to execution, as are now or may be hereafter provided by the laws of the State of New York, which laws (in respect of Common Law causes) are hereby adopted."

The applicable sections of **Article 45 of the New York Civil Practice Act,** entitled "Proceedings Supplementary to Judgment" (Sections 773 through 810), are as follows:

> "§ 773. IN WHAT CASES JUDGMENT CREDITOR MAY MAINTAIN PROCEEDINGS. To entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by any court of this state, whether or not of record. A decree or order awarding the payment of money shall be deemed a judgment for the purpose of this article. A proceeding may be maintained until such judgment is satisfied, vacated or barred by the statute of limitations. [Added by L. 1935, ch. 630, in effect Sept. 1; see old § 775.]"

> "§ 774. HOW PROCEEDINGS MAY BE INSTITUTED. Proceedings under this article may be instituted:
>
> 1. By order of the court.
>
> 2. By subpoena of the judgment creditor's attorney, served upon the judgment debtor, a third party or a witness.
>
> 3. By warrant issued as in this article provided.
>
> Such order or subpoena shall require the attendance of the judgment debtor or third party or witness, to whom it is directed, to appear for examina-

tion at a time and place to be specified therein, concerning the property of the judgment debtor. Examinations of the debtor, third party and witnesses may be had simultaneously or separately, and the close of one or more of such examinations shall not affect the proceedings not concluded. [Added by L. 1935, ch. 630, in effect Sept. 1; see old §§ 773, 774.]"

"§ 783. MANNER OF SERVICE OF ORDERS, SUBPOENAS AND WARRANTS.

1. An injunction order, or an order or a subpoena requiring a person to attend and be examined, made as prescribed in this article, must be served by delivering to and leaving with the person named therein, a copy thereof, together with a copy of the affidavit, if any, upon which such order was granted. Service upon a corporation is sufficient if made in the same manner as a summons may be served upon such corporation unless the officer or agent is specifically designated in the subpoena or order, in which case service shall be made upon him. * * *

2. * * * [Added by L. 1935, ch. 630, in effect Sept. 1, from old Sections 798, 799.]"

The sections applicable to the service of process in this proceedings are found in the **New York Civil Practice Act** (L. 1920, Ch. 925), as follows:

"§ 218. SUMMONS GENERALLY. A civil action is commenced by the service of a summons, which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon."

"§225. PERSONAL SERVICE OF SUMMONS UPON A NATURAL PERSON. Personal service of the summons upon a defendant being a natural person must be made by delivering a copy thereof within the state as follows:

1. * * *

2. * * *

3. In any other case, to the defendant in person."

> "§ 403. ISSUANCE OF SUBPOENA. A subpoena is a process in the name of the court, referee, body or other person authorized by law to issue the same, requiring the attendance of a witness at the trial or hearing of a cause or the hearing of a motion or before a referee or other person where proof or the production of books, papers or other documents is required."

A special proceeding is defined in the **New York General Construction Law** (Cons. Laws, Ch. 22, 1909, as amended by L. 1920, Ch. 917) as follows:

> "§ 46-a. SPECIAL PROCEEDING. Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

The **New York Rules of Civil Practice** (adopted pursuant to L. 1920, Ch. 902, as amended by L. 1921, Ch. 370) applicable in this proceeding reads:

> "Rule 21. MANNER OF SERVICE OF PAPERS TO BEGIN A PROCEEDING. The provisions of the statutes and rules relating to the mode of personal service of a summons shall apply to the service of any process or other paper whereby a proceeding is begun in a court, or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action."